

## ALLAHABAD HIGH COURT

Naima Khatun

Vs

Basant Singh

(Sulaima, C.J. Young, J.)

19.12.1933

### ORDER

**Sulaiman, C.J. and Young, J.**

1. This is a plaintiff's appeal arising out of a suit for damages for breach of contract. On 18th September 1925 the plaintiff's husband sold half a village called Aghwan Hera to the defendant for Rs. 35,000. On 1st December 1925 three documents were executed : one was a sale deed by the defendant to the plaintiff for Rs. 25,000 re-turning the village previously purchased, another sale deed by the plaintiff to the defendant for Rs. 28,000 of shares in another village, Pilkhani, and a third a security bond executed by the defendant in favour of the plaintiff. Under the sale deed executed by the plaintiff in favour of the defendant Rs. 8,200 were acknowledged to have been previously received, and Rs. 19,800 were left in the hands of the defendant to be paid in equal amounts to two previous creditors. There was a statement in the deed that there were no prior encumbrances. Under the security bond executed by the defendant he agreed to indemnify the plaintiff, if he did not carry out his part of the contract. The rubkar of the appellate Court, dated 23rd February 1926, indicates that mutation of names was effected in favour of the defendant, Basant Singh, in respect of the village Pilkhani. It is not now disputed that the defendant did not discharge the prior encumbrances. The plaintiff has accordingly brought his suit for damages for the breach of this contract.

2. The claim was resisted on the ground, first, that the defendant was a minor on 1st December 1925, and therefore is not bound by the contract made with the plaintiff. Secondly, that the contract had been obtained by fraud and misrepresentation, and is voidable at the option of the defendant. The learned Subordinate Judge has come to the conclusion that the defendant, was, in fact, a minor on the date of this transaction and that the document was obtained under some misrepresentation. He has accordingly dismissed the suit. In appeal his findings are challenged.

3. It would be convenient to take up the question of the minority of the defendant in the first place. It cannot be disputed that the burden of showing that the defendant was a minor on the

date when he entered into the contract with the plaintiff lies heavily upon the defendant. We may only refer to the recent pronouncement of their Lordships of the Privy Council in the case of *Sadiq Ali Khan v. Jai Kishori* A.I.R. 1923 P.C. 152. The only question is whether the defendant has discharged this burden. The defendant produced three witnesses, besides himself, as to his age. The learned Subordinate Judge has not referred to the oral evidence on this question at all and has based his finding exclusively on the documentary evidence. The reason, in our opinion, is obvious. The oral evidence was not such as could be implicitly relied upon. The first witness, Jhanda Singh, is a cultivator by occupation and was employed in the army from 1899 and was in service till 1922. According to his statement, the first time when he took leave, and he does not remember when he took any other leave and came to his village, Basant Singh was born in the village. This was seven years after his entering into service. He is not a relation of the family of the defendant. Another curious fact is that he came home on leave in the month of January and not in the hot weather. We also find it difficult to believe that he would be able to remember this fact after a lapse of more than 20 years.

4. The second witness is Santa Singh, who is a lambardar in the very village in which the defendant was born and is a resident of that village. He is the defendant's caste-fellow, but not a relation-According to his recollection, the defendant was born in the month of Magh in Sambat 1962, and when he was brought from Vaiyen Poin to the village of his adoptive mother, Rani Bisben Kuer, he was about one or one and a half years of age. In cross-examination he suggested that his source of information as regards-the age of the defendant was based on what he saw written in connection with some case in which there was a compromise, and "that is kept in the thana for some time and then goes to the district-headquarters." The last mentioned passage indicates that he was referring to the birth register maintained at the circle police station, which at the end of the year is forwarded to headquarters. W(c) doubt whether he could have access to that record at the police station, He was not able to give the details of other events. when questioned in cross-examination. We shall show later that this birth register is no evidence of the fact at all.

5. The third witness is Kala Singh who was one of the attesting witnesses to the deed of adoption executed by the defendant's adoptive mother. In his examination in chief he did not say anything: about the defendant's age at all. The-counsel for the plaintiff however cross-examined him on that point and he stated that Basant Singh would be 22 years of age. This was under-estimating the age of the defendant by a year, even if we accept the statement of the defendant himself. He stated that he knew the age of the defendant because when Rani Sahila made the adoption Basant Singh was a suckling babe of about one or one and a-half years of age. Unfortunately for the defendant this witness omits to say that he was present at the time of the adoption and saw the child with his own eyes; nor does he say that the deed of adoption was executed on the day of the adoption. When cross-examined he said that he would have been 23 or 24 years of age at the time, and he has no personal knowledge of the date of the birth of Basant Singh. He was not able to say when other people in the village of his own birth were born. In our opinion, in a case of this kind we cannot accept the testimony of such witnesses, especially when they have not been

relied upon by the learned Subordinate Judge who heard them.

6. The case for the defendant rests entirely upon the documentary evidence. This consists of (1) an entry in a birth register of the year 1906; (2) the deed of adoption dated 8th July 1907; (3) a plaint filed by certain collaterals Mewa Singh and others, dated 30th March 1908, to set aside the deed of adoption; and (4) a plaint dated 23rd August 1919 filed by Basant Singh through his certificated guardian for setting aside an alienation. The learned Subordinate Judge has strongly relied on all these pieces of evidence and has considered the documentary evidence produced on behalf of the plaintiff, which we shall discuss later, as insufficient to outweigh this evidence. In a case of this kind when the principal question is one of fact, we would have been most reluctant to take a different view of the evidence, if we were not of the opinion that some of the documents relied upon by the Court below are legally inadmissible in evidence. We first take up the entry in the birth register of 1906, (p. 31). It shows that a boy born was born to one Jwala, resident of Viuyen Poin, who was a Hindu, on 4th February 1906. The name of the informer was Lalu. No evidence was produced to connect this Jwala with the father of the defendant; nor can there be any certainty that there was only one person of the name of Jwala in this village Viuyen Poin. The full name of the defendant's father was Sardar Jwala Singh. In our opinion a mere entry of this kind, assuming that this is a genuine record, would fail to establish the identity of the defendant's father; much less would it be any proof that this refers to the birth of the defendant and not to any younger brother of his. We are therefore of opinion that an entry of this type standing by itself is wholly insufficient to show that it refers to the defendant. We have given fuller reasons in our judgment in the case of *Saidunnisa v. Ruqya*<sup>1</sup>

7. The deed of adoption was executed by the defendant's adoptive mother, Rani Bishen Kuer, and bears her signature in Gurumukhi. The endorsement of the Sub-Registrar says that she was a purdanasin lady and admitted the execution and completion of the document from behind the purdah of a wooden door leaf. In this document she refers to the fact of having adopted the boy, and that he would be the owner of the entire property of her husband like the begotten son of her husband. She also states that she had performed the adoption ceremonies according to the custom prevailing in her husband's family, and further states "at present Basant Singh aforesaid is about one and a half years old." The lady is dead and cannot now be called. The condition required in the opening portion of Section 32, Evidence Act, which alone is relied upon for purposes of admissibility, is therefore fulfilled. The learned advocate for the respondent strongly argues that this document falls within Sub-section 5 of Section 32, and that the statement, inasmuch as it relates to the existence of relationship by blood and adoption, made by a person having a special means of knowledge and at a time when no question in dispute had arisen, was admissible in evidence. There can be no doubt that the rule of English Law is particularly strict, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. In *Haines v. Guthrie*<sup>2</sup> an affidavit filed by the defendant's father stating the date of the defendant's birth in an action to which the plaintiff had

not been a party was held inadmissible as evidence of the age of the defendant in support of his defence. In India we have Section 32, Evidence Act, which does not seem to be so strict. It is however clear that if a statement does not fall within Section 32, it could not be admissible under Section 11 of the Act: *Bela Ram v. Mahabir Singh*<sup>3</sup> and *Munna Lal v. Kameshari*<sup>4</sup>. Obviously there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue.

8. If we were to take Sub-section (5) of Section 32 literally, it might in one sense be said that a statement relating to the age of a boy is not a statement relating to the existence of any relationship by blood or by marriage. But it has been laid down by their Lordships of the Privy Council in the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*<sup>5</sup> following an observation made by a learned Chief Justice of the Madras High Court, that the question of age falls within this sub-section because it indicates the commencement of such relationship. When a person says that this relation was born on such and such a date, he by implication states that his relationship with the person came into existence on that date. In this view of the matter a statement made as regards age would be tantamount to a statement as to the existence of relationship.

9. The learned advocate for the appellant however argues that the ruling is not applicable to the case before us. The relationship between Rani Bishen Kuer and Basant Singh arose by virtue of his adoption, and not by virtue of his birth. If the statement as the date of the adoption made by the adoptive mother would therefore undoubtedly come under Sub-section 5, because it would be the commencement of the relationship by adoption with her. But it is urged that her statement that the boy had been previously born on a particular date is no part of any statement as regards the commencement of her relationship with him, and is therefore not admissible. It is true that to some extent the statement made by Rani Bishen Kuer, as regards the age of the boy in the deed of adoption is distinguishable from the admission made by the father as to the age of his son in the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*<sup>6</sup> Nevertheless we think that two must apply the same principle to this case and hold that the statement made by the adoptive mother as regards the age of the boy, although it would not show her own relationship with him, was originally admissible. There is no doubt that their Lordships of the Privy Council have interpreted this sub-section in a liberal sense and it seems to be our clear duty to follow that example. We are also of opinion that although there is something to be said for the view that she might possibly not have had special means of knowledge we must in this case presume that she had such special means.

10. The learned advocate for the appellants points out that the defendant had been born in Viuyen Pooin, which is in the district of Amritsar, at some distance from the village in Saharanpur, where his adoptive mother used to reside, and that she might not have had personal knowledge of his birth. She must however have of necessity seen the boy at the time of the adoption and she must have made enquiries about him before the adoption. It may be that the age given in the deed of

adoption was based on what she had heard from his parents or relations, or that it was based on her estimate of the age of the boy when she saw him. The estimate is approximately given, and the exact date of his birth is not stated. In view of all these circumstances, we think that we must hold that an adoptive mother, who sees the boy at the time of the adoption, and who would in all probability have made enquiries about him, is a person who must be deemed to have special means of knowledge within the meaning of Section 32(5). The learned advocate for the appellant has drawn our attention to the allegation made by the defendant's guardian in the plaint filed by him in 1919, that the lady was under the influence of Uttam Singh, who had obtained a deed of transfer in his favour before the adoption, and has suggested that Uttam Singh might have been anxious to prolong the period of the defendant's minority in order to protect himself against any suit for setting aside the transfer, and has also urged that the lady herself might have been anxious to prolong the period of his minority in order to keep control over the property. But such suggestions are really directed against the weight of the evidence and not its admissibility. the question of its value, of course, is another matter.

11. We now come to the plaint of 1908 filed by a large number of collaterals. The defendant led no evidence to show that any of the persons who signed the plaint was dead or that he could not be found, or that he had become incapable of giving evidence or that his evidence could not be procured. He therefore did not lay the foundation for the admission of this previous statement under Section 32, Evidence Act. He did produce one Santa Singh, whose name was mentioned in the array of the plaintiffs, and who stated that he had filed a suit for the cancellation of the adoption. Santa Singh however is not one of the signatories to the plaint, and the allegation contained in the plaint cannot be regarded as a previous statement made by Santa Singh. We therefore think that in the absence of any evidence to show that the persons who actually made the statement and signed the plaint could not be conveniently produced, the plaint was not admissible in evidence at all. The mere fact that the signatories claimed to be collaterals and some of them were residents of the same village would not by itself necessarily imply that they had special means of knowledge as to the birth of the defendant. We therefore hold that this plaint is not admissible. We also think that an approximate estimate of the age of the defendant made by third parties who might not have had any special means of knowledge is not of much value.

12. We now come to the certificate of guardianship of the year 1915. It may be noted that the defendant has produced the original certificate of guardianship granted to his certificated guardian by the District Judge, but not the application which was filed by the guardian. This certificate is on a printed form, and the note which we got recorded at the time after inspecting it would show that the words "date of birth 9th February 1906," on which strong reliance is placed in order to prove the date of the birth of the defendant are put down as a marginal note, and not in the body of the document, and they are in a different ink and pen from the earlier marginal note which given the name, parentage, caste and residence of the guardian Pala Singh. In the body of the document the period during which the defendant's minority is to continue is stated to be up to

February 1926. This is the only place where, according to the printed form, there is a blank place where the age could be specified. As noted above, there are two additions on the margin in manuscript, one giving the description of the guardian in a few lines, followed by other lines giving the date of the birth of the defendant in a different ink. Apart from the fact that the note giving the date of the birth is in ink different from that in which the other marginal note is written, there is a discrepancy between this date and the period of minority entered in the body of the document. We have also noted that although there is no ground for suspecting that anyone on behalf of the defendant has tampered with the figure 1906, there is no doubt that the figure 4 is also visible at the same place. We do not however regard it as a suspicious circumstance operating against the defendant for two reasons: first, because although we are not certain about it, figure 4 seems to have been written over figure 6 and not vice versa, and, secondly, because no objection as to the genuineness of this marginal note was raised at the trial when the document was admitted against the plaintiff. The only thing that can be said is that it was not specifically admitted by the plaintiff (vide the admission of his vakil as found in the statement signed by him) and the note made by the Subordinate Judge at the end of the deposition of Mohammad Saddiq is differently recorded but it is not signed by the vakil. The fact of a discrepancy between the period of minority ending in February 1926, as mentioned in the body of the document and the date of the birth mentioned in the marginal note stands, and we find nothing suspicious in the year 1926 as written in the body of the document. This year would not tally with the year as given in the plaint; but it would still make the defendant a minor on 1st December 1905. We are not prepared to regard this certificate of guardianship, in view of the discrepancies in the year in the same document, as being of any great value or a document on which we could implicitly depend, particularly when, as will be shown later, the original application of the guardian containing the date of the birth of the defendant is not produced, and the defendant has further omitted to produce the previous application for guardianship made by his own father.

13. We further think that this document is wholly inadmissible in evidence. It cannot be admitted under Section 32, Evidence Act, because it is signed by the District Judge who cannot be said to be a person having any special means of knowledge as to its contents. It is however urged that the document falls under Section 35, Evidence Act. In the case of *Amtul Saida v. Ruqya alias Walan*<sup>7</sup> we have given our reasons for holding that this document cannot fall under Section 35, Evidence Act, because it does not contain any entry in any public or other official book, register or record, inasmuch as there is no rule requiring the District Judge to maintain any such official book, (register or record. Our view is in accordance with the view taken in an earlier case in this Court, and has been followed by the Calcutta and Patna High Courts. The Oudh Court, on the other hand, has taken a contrary view, and that Court seems to have been of the opinion that such a certificate is admissible. The learned Counsel for the respondent relies strongly on the case of *Sadiq Ali Khan v. Jai Kishori* A.I.R. 1923 P.C. 152(Supra), decided by their Lordships of the Privy Council, and strenuously contends that we are bound by that ruling and must hold that the certificate is admissible in evidence.

14. In that case also the question of the minority of the defendant was in issue. The burden was held to lie on the defendants, and in order to discharge it, they produced a deed of gift executed, by their mother in their favour in which their ages were stated; also an application for guardianship filed by the father in which their ages were stated, the order of the Court granting the application and the certificate of guardianship issued by the Court. Then again there was another application filed by the mother, who was subsequently appointed guardian in the place of the father, the order granting that application and the certificate of guardianship issued thereupon. So far as the record of the Court was concerned, the defendants were obviously minors and under 21 years of age on the date when they executed the mortgage deeds. But the proceedings relating to the registration of the document indicated that it was assumed that the ordinary age of majority was 18 years and not 21. Their Lordships considered it to be reasonably certain that had the certificate of guardianship been brought under the notice of the sub-registrar, the transaction would not have been completed. This was one sided evidence and there was nothing to contradict it. At p. 687 (of 26 A.L.J.) their Lordships remark: The documentary evidence and the proceedings instituted in relation to the two mortgages are so weighty that, if they stood alone and were unchallenged, they would conclusively establish the fact of minority.

15. Their Lordships concluded that in their view this evidence was sufficient to satisfy the onus of proof which rested upon the appellants in the first instance. At p. 690 their Lordships particularly emphasised that such evidence is always far less reliable than contemporaneous statements such as those made by the parents of the parties without any possible motive for misrepresenting the facts. The conclusion of their Lordships was that the onus of proving the minority was discharged. As the Oudh Court had been of opinion that a certificate of guardianship is admissible for the purpose of proving the age of a minor entered therein, this question was apparently not raised in the Oudh Court. Counsel before their Lordships of the Privy Council also did not raise any such question. Their Lordships' judgment indicates that their Lordships were resting mainly on the statement made by the parents of the minors namely, those contained in the deed of gift, and the applications for guardianship, and not so much on the certificates of guardianship. Had there been any sentences in the judgment of their Lordships to indicate that their Lordships considered the certificate of guardianship, without the application on which it was based, to be itself admissible, it would have been our bounden duty to accept this document. We are of opinion that the mere fact that the certificate of guardianship was referred to by their Lordships of the Privy Council in Sadiq Ali Khan's case A.I.R. 1923 P.C. 152 does not amount to overruling the previous decisions of this Court and other High Courts. We are therefore of opinion that until the ruling in Saidunnissa's case, following an earlier ruling of this Court, is expressly overruled, we must reject this document.

16. The last document is a plaint dated! 23rd August 1919. It was filed by the defendant's certificated guardian, Pala. Singh, and in para. 2 it was specifically stated that Basant Singh was born in 1906, and in para. 4 it was further stated that the plaintiff was about one and half years old at the time of his adoption. But curiously enough in the heading of the plaint the age of

Basant Singh was put down as 15 years on 23rd August 1919, which would tally more with the plaintiff's case that he was born in 1904 rather than with the defendant's case that he was born in 1906. There is therefore an obvious discrepancy in this very plaint, and one of the two statements is incorrect. One helps the plaintiff and the other helps the defendant. Standing by itself therefore we cannot consider it as a document of very great reliability. We are further of opinion that this document also is not admissible in evidence. Pala Singh was summoned as a witness on behalf of the defendant in the list of witnesses, but he was not produced. There is no evidence on the record to show that he is dead or that he cannot be conveniently produced. In the absence of such evidence, the defendant did not therefore lay the foundation for proving this statement as required by the opening portion of Section 32, Evidence Act. We must now deal with the point of estoppel raised on behalf of the defendant. It has been urged very strongly before us that it is not now open to the plaintiff's counsel to challenge the admissibility of the documents which were admitted in the Court below, inasmuch as no such point was taken at the trial. That there is no reference to the question of admissibility in the judgment of the learned Subordinate Judge admits of no doubt. We are therefore prepared to presume in favour of the defendant that no question of the admissibility of these documents was raised at the time of the arguments.

17. We find from the order sheet that the documentary evidence had been filed by the defendant, the plaintiff's counsel specifically stated that he did not admit the documents Nos. 1, 2 and 4 on the list. They were (1) a copy in the birth register, (2) the deed of adoption, and (3) the copy of the plaint filed by Basant Singh. The defendant attempted to summon one Lalu whose name appears in the entry in the birth register, produced Kala Singh, one of the attesting witnesses to the deed of adoption, and also summoned the original plaint of Pala Singh and produced a vakil to prove the signature. This was done on 8th June 1929. After this the statements of the counsel for the parties were recorded and signed by them. It is in these words : "Vakils for the parties state that copies of the documents registered or duly obtained and tendered in evidence by one party are admitted by the other." The learned Subordinate Judge made a note of this admission at the foot of the deposition of a witness Mohammad Sadiq, vakil, who proved the original plaint of Pala Singh. We may further note that on the same day the Court noted that the defendant's Exs. F, G, H and K were taken in evidence. But the note made therein does not exactly tally with the admission made by the counsel which was signed by them. We think that we cannot tie down the plaintiff's counsel to anything more than was admitted by him in the statement duly signed. He agreed to accept copies of all the documents which were registered or which had been duly obtained. This admission does not relate to any original document and particularly not to the deed of adoption which had not been admitted previously.

18. We are of opinion that when a party admits the genuineness of a document he is bound by his admission and cannot be allowed in appeal to go back upon it. But the question as regards the admissibility of the document would still be open to him if there has been no contrary admission in express language and no waiver. In the case of a trial by a jury the omission to waive an objection as to the admissibility of a document may not be allowed to be taken at a later stage

because it would necessitate a retrial. But the position in the case of a trial by a Judge is quite different. We think that an appellate Court which has the duty to weigh the evidence on both sides afresh and for its own satisfaction, is not bound to act upon inadmissible evidence merely because no objection to its admissibility was taken in express terms in the lower Court. Indeed we are inclined to think that it is our duty to ignore such a document if we are satisfied that it is not legally admissible. The learned advocate for the respondent relies on the case of *Shahzadi Begam v. Secretary of State*<sup>8</sup> and particularly on the passage in the judgment of their Lordships of the Privy Council at p. 1074. But there the question of the admissibility of the document was neither raised in the trial Court nor in the appellate Court. On the other hand, assuming that it was admissible, the respondent's counsel was trying to challenge the document as a forged one. It was attempted to raise the question of its admissibility for the first time before their Lordships of the Privy Council, and accordingly their Lordships of the Privy Council observed that they are further of opinion that it is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial. In the case of *A.B. Miller v. Babu Madho Das*<sup>9</sup> their Lordships of the Privy Council remarked that an erroneous omission to object to the admission of inadmissible testimony did not make it available as a ground of judgment. No doubt there the question had arisen in the trial Court itself. But there also, as pointed out above, there was no express waiver of any such objection on behalf of the plaintiff, though the judgment indicated that the point was not pressed at the time of the argument. We think that when weighing the evidence we must reject what we considered to be legally inadmissible. The learned advocate for the respondent also urges that if the plaintiff had taken the objection in the Court below, his client might have been able to produce some further evidence in support of his case. We would however point out that the burden of proving the minority lay upon the defendant, and he led evidence in the first instance. The defendant was not entitled to assume that the evidence which he had led was necessarily sufficient and must be accepted by the Court. Before he closed his evidence it was his duty to produce all the evidence which he thought it was necessary to produce and which was available. (After considering the evidence as to minority their Lordships proceeded.) We must now dispose of one of the points urged on behalf of the appellant's counsel. His contention is that inasmuch as the Court declared the minor to have attained majority on 18th April 1925 the order is final under Section 48, Guardians and Wards Act (Act 8 of 1890), and is not liable to be contested by suit or otherwise. We think there is absolutely no force in this contention. That section applies to a case where an order has been made under the Act. The Act contains no provision for the District Judge making an order declaring that the minor has attained majority. On the other hand, Section 40 provides that a guardian may apply to the Court to be discharged, and if the Court finds that there is sufficient reason for the application it shall discharge him. It does not go on to say that the Court shall declare the minor to have attained majority in case that is the ground of discharge.

19. As a matter of fact, under the provisions of Section 41, the powers of the guardian automatically cease on the ward ceasing to be a minor. No order by the Court declaring him to have attained majority is required by Section 41. We are therefore of opinion that the Court,

when it accepted the fact that the minor had attained majority, did not make any order under the Act, which would be final and not liable to be contested by suit or otherwise. We think that it is open to the defendant to show that he had not attained the age of majority on that date, in spite of the orders passed by the Senior Subordinate Judge.

20. The question therefore resolves itself exclusively to one of weighing evidence. As remarked above, the burden of proving his minority on the 1st December 1925 lay heavily on the defendant. Apart from the oral evidence, which we have rejected as untrustworthy, the only evidence which we think can be legally admissible is the deed of adoption dated the 8th July 1907 executed by Rani Bishen Kuer the defendant's adoptive mother. Its value would have been very great indeed if there were any question as to the date of the adoption and if the date were entered in the document. The date of the birth of the adopted boy as entered in the deed of adoption is not equally weighty. It must either have been based on what she heard from the boy's parents and relations which is hearsay, though it may be admissible on a question of relationship, or she might have estimated his age by observing him. The estimate might be tolerably good, but cannot be exact. On the other hand, there is a possibility that the age was put down by some one responsible for the draft of the deed and that she took no objection to it. It is important to note that the exact date of his birth is not entered in it, but only his age "about one and a half years old" is entered. It is obviously an approximate estimate. We have already noted that she was a pardanashin lady and it may be a question whether an approximate estimate entered in a document signed by her is necessarily of great value. This evidence has been produced to contradict the previous admissions of the defendant and his course of conduct before the execution of the security bond in question. More reliable evidence, namely, the original application filed by his own father, Jwala Singh, for getting himself appointed as his guardian has not been produced; nor has his uncle, who was the next guardian, been produced as a witness; nor has any other relation of his who would have special means of knowledge as to the date of his birth been produced. Even the documentary evidence produced by the defendant, which we have rejected, contains discrepancies as regards the exact age.

21. Having regard to all these circumstances, we think that in a case of this kind where the defendant is repudiating a registered document solemnly executed by him, the burden of proving his minority has not been discharged by him. We therefore hold that it is not proved that the defendant was a minor on the 1st December 1925, and that therefore it is not proved that the security bond is void on that ground. (After discussing the evidence as to fraud and misrepresentation, their Lordships proceeded.) We are therefore clearly of opinion that there is no evidence which in any way can be said to be sufficient to prove any fraud practiced on the defendant which would render the transaction voidable. There are two other points which may now be mentioned. The defendant's case was that some shops and lands had been contracted to be sold and had been fraudulently excluded from the document. The learned Subordinate Judge has not believed this story as regards the sale of shops, etc., but has preferred to act upon the evidence of the defendant alone that a grove has been wrongly omitted. As the document was a

registered deed and mutation of names followed upon it and there was no written protest made by the defendant for a long time, we are not prepared to agree with the Court below that; the defendant's uncorroborated statement by itself is sufficient to prove that a fraud was committed and that a grove was fraudulently excluded.

22. The defendant took a further plea in the written statement that the plaintiff was bound to pay the balance of the previous encumbrances before the defendant could be called upon to pay the amounts left in his hands for payment. In the sale deed (p. 145) the amounts left in the hands of the defendant for payment to the two previous creditors are mentioned first and there is a recital at the end that the plaintiff would be responsible to get the property released. We think that, as these recitals stand, it was the duty of the defendant to pay the specific amount named in the deed in the first instance. This conclusion is further supported by the circumstance that in the security bond executed by the defendant in favour of the plaintiff there was a clear stipulation that the defendant would pay the amount left with him by 10th January 1926, and that if he failed to pay the said amount by the date mentioned, then he would be liable to pay to the plaintiff damages to the extent of Rupees 15,000 in addition to the amount aforesaid. In view of this covenant we fail to see how it could be the duty of the plaintiff to pay the unsatisfied balance in the first instance. We accordingly see no force in this contention.

23. As pointed out above the learned Judge has approached the question of damages from a different standpoint altogether. We ought therefore to have a clear finding as to the amount of damages to which the plaintiff is entitled on the supposition that the defendant was of age on the date of the transaction in December 1925, and that there was no fraud committed by the plaintiff upon him which would render the transactions voidable.

24. We accordingly ask the Court below to record a fresh finding on issue No. 4. The parties will not be allowed to produce any further evidence, as no one has been prevented from adducing any evidence. Let the findings be returned within three months from this date if possible. The usual ten days will be allowed for objections.

25. After receiving the finding their Lordships delivered the following judgment:

**Sulaiman, C.J. and Young, J.**

26. The facts of this case will appear from our order dated 7th April 1932, and may very briefly be stated as follows: There were two simple mortgages in favour of Mt. Jamni and Mt. Makhmali respectively, for Rupees 13,500, each on three items of properties : (1) a pucca built shop : (2) half of a house and (3) 19 bighas odd of zamindari property in village Pilkhani.

27. According to our findings a previous transaction between the plaintiff's husband and the defendant was substituted by a fresh transaction on 1st December 1925, when three documents were executed. One was a sale deed by the defendant in favour of the plaintiff under which the

property previously transferred by the latter to the former was re-transferred by the defendant; under the second sale deed executed by the plaintiff in favour of the defendant she transferred 175 bighas in the same village Pilkhani for Rs. 28,000. The third document filed is a security bond which was executed by the defendant in favour of the plaintiff. Under the sale deed executed by the plaintiff in favour of the defendant, a sum of Rs. 19,800 was left in the hands of the defendant-vendee for payment to the two previous mortgagees named above. The executant stated that she shall be liable to get the said property relinquished from the bond.

28. Under the security bond executed by the defendant in favour of the plaintiff on the same date, the defendant agreed that he shall pay by 10th January 1926, the sum of Rs. 19,800 left with him for payment of debts due to the two mortgagees, as directed in the sale deed and further promised that he would raise no objection, and if he failed to pay the said amount by the date mentioned, he should be liable to pay to Mt. Naima Khatun the sum of Rs. 15,000 as damages in addition to the amount aforesaid (the word is *alawa*). The security bond provided that in case of default in payment the plaintiff would have power to realize the amount aforesaid with damages and costs by the enforcement of the hypothecation lien. Mutation of names was effected in favor of the defendant, but it is an admitted fact that the defendant did not pay any part of this amount to the previous mortgagees, It is also not disputed that up to the date of the institution of the suit, the plaintiff had not paid any part of the mortgage debt herself.

29. The plaintiff brought the present suit against the defendant for recovery of Rs. 19,800 principal and Rs. 12,000 as damages, together with interest *pendente lite* and future costs of the suit. In the body of the plaint the claim was principally one for damages. The defendant resisted the claim on the ground that the sale deed and the security bond executed by him had been obtained from him by fraud and misrepresentation and further that he was a minor on the date of the execution of these documents. He also denied his liability to pay any amount to the plaintiff. The questions of fact have already been disposed of by our previous order. As regards the question of damages, the Court below has held that the plaintiff is entitled to damages represented by the amount of interest which has accrued on the previous mortgages only to the extent of the sum of Rs. 19,800 which had been left in the hands of the defendant for payment to the mortgagees for his costs. He has assessed the amount at Rs. 8,279-12-0.

30. The question that arises before us is whether the plaintiff is entitled to a decree for refund of the whole or part of the amount of Rs. 19,800 left in the hands of the vendee and whether he is entitled to any damages on account of the accrual of interest. It has to be conceded on behalf of the plaintiff that up to the time of the institution of the suit she had not incurred any other damage; for instance no part of the property in her possession has passed out of her hands, and that she has not had to pay to the mortgagees any part of the mortgage debt. It is suggested that a new situation has arisen during the pendency of the suit. The first question for consideration, subject to the point having been raised in the pleadings, is whether if the defendant failed to carry out his promise as contained in the security bond, and did not make the payment to the

mortgagees, the plaintiff is entitled to recover that amount or any part of it from him. The second question is whether without having herself paid any amount to the mortgagees and without losing possession of any part of her own property, the plaintiff is entitled to maintain the suit for damages against the defendant on the same ground that owing to the default of payment on his part interest has accrued to the mortgagees on the mortgage debts although only a suit by one of the mortgagees to recover the mortgage money has till now been brought. No sale has taken place up to the institution of the present suit. No direct authority has been cited before us. In the case of *Raghukul Tilal v. Pitam Singh* A.I.R. 1931 All. 99 (Supra) the observations are in favour of the appellant, but that was a case where apparently the property transferred to the vendee was free from all encumbrances. On the other hand, there is a case decided by their Lordships of the Privy Council in *Muhammad Siddiq Khan v. Muhammad Nasir Ullah Khan* (1899) 21 All. 223 (Supra), but there the vendor appears to have agreed to pay the money due to the mortgagees and the money left in the hands of the mortgagee was to be retained by the latter as security, that the property sold should be freed from the encumbrances upon it and that they have a good title. The case of *Badri Das v. Jivan Lal* (1912) 15 I.C. 854 (Supra) was a case of which the facts are more similar to the case before us, but there too the Bench proceeded on the assumption that the vendor had to discharge the previous mortgages. In the present case, in addition to the ordinary statutory liability of the vendee to pay to the vendor the unpaid purchase money, there was the security bond under which the defendant undertook to deposit the amount without objection by the fixed date and held himself liable to pay Rs. 15,000 by way of penalty if he failed to do so.

31. An equitable way may perhaps be to give the plaintiff a decree for a proportionate amount out of the amount left in the hands of the vendee which would represent the burden on the property retained by her. At the same time it seems very doubtful whether the plaintiff can recover any amount by way of damages, as in point of fact she has not suffered any damage and all that has happened is a legal liability to pay further interest which has accrued. It may also be possible to grant the relief in a modified form by directing specific performance. No clear authority has been cited by counsel before us. We think that the questions raised in this appeal are of sufficient importance to require an authoritative pronouncement. We accordingly refer the following question to the Full Bench, (1) Whether the plaintiff is entitled to any decree for refund of whole or part of the amount left in the hands of the vendee. (2) Whether she is entitled to any decree for damages. (3) Whether a decree for specific performance can be granted in the case.

32. The record will be laid before the Chief Justice for the constitution of a Full Bench.  
Sulaiman, C.J.

33. For the purposes of this reference only a few facts are necessary. The plaintiff, Mt. Naima Khatun, had, on 21st August 1923, executed two simple mortgage-deeds for Rs. 13,500 each in favour of Mt. Jamni and Mt. Makhmali respectively. But the whole of the mortgage moneys were not paid to her. Under these mortgages a shop, half of a house and zamindari property in village Pilkhani were hypothecated.

34. On 18th September 1925 the plaintiff's husband executed a sale-deed of a half share in village Aghwan Hera for Rs. 35,000 in favour of the defendant. This transaction was substituted by another transaction in the form of three documents which were executed on 1st December 1925. On this date the defendant sold to the plaintiff the share in village Aghwan Hera for Sections 25,000 which he had previously purchased from the plaintiff's husband. The plaintiff sold to the defendant shares in the village Pilkhani for Rs. 28,000 which had been previously mortgaged. In the sale-deed Rs. 8,200 were acknowledged to have been received and two sums of Rs. 9,900 each were left in the hands of the vendee for payment to the mortgagees of the mortgage-deeds dated 21st August 1923 (the date 20th August is admittedly a mistake for the 21st). The vendor assured the vendee that besides the amounts due under these mortgage bonds the property was not subject to any other encumbrance. On this very date, namely 1st December 1925, the defendant executed a security bond in favour of the plaintiff agreeing to pay the sum of Rs. 19,800 to the previous mortgagees by 10th January 1926, and in case of failure of payment to be liable to pay Rs. 15,000 as damages in addition to the aforesaid amount. The actual interpretation of this document is a matter of controversy, and we shall consider it later.

35. Admittedly the defendant did not make any payment to the mortgagees. Indeed, he did not even tender the money to them, the reason being that he took up the position that he was a minor and also that some fraud was committed upon him and that accordingly he was not bound by the contract. These pleas have been overruled by the Division Bench. Owing to non payment the mortgagees brought suits on their deeds and obtained decrees against the plaintiffs for their mortgage debts with interest and costs by sale of the properties included in the sale deed in favour of the defendant and also the other two properties of the mortgagor. But up to the date of the institution of the suit the plaintiff had neither made any payment to the mortgagees nor had any property of hers been sold under the mortgage decree. It is suggested that some sale had taken place during the pendency of the suit. We are not concerned with that at present.

36. On 1st December 1925, when the plaintiff left two sums of Rs. 9,900 each for payment to Mt. Jamni and Mt. Makhmali, the amounts due to them were slightly more. It has been calculated that even if they had been paid Rs. 9,900 each there would have been Rs. 1,147 and Rs. 2,725 still due to them respectively. It is on these facts that the following three questions have been referred to the Full Bench : (1) Whether the plaintiff is entitled to any decree for refund of whole or part, of the amount left in the hands of the vendee. (2) Whether she is entitled to any decree for damages. (3) Whether a decree for specific performance can be granted in this case.

37. The position would have been simple if either (a) the properties sold to the vendee had not been previously encumbered and the vendee had been directed to pay off debts which were due exclusively from the vendor, or (b) if the previous debts, for the payment of which money was left in the hands of the vendee, were a charge exclusively on the property transferred. The complexity of the case before us arises because although there were three items of properties

mortgaged under the previous mortgage deeds, to pay off which money was left in the hands of the vendee, only one of such properties was transferred to him. The discharge of the previous mortgages would therefore have benefited both the vendor and the vendee.

38. Now where the previous encumbrances are a charge exclusively on the property transferred to the vendee, the result is that only the equity of redemption is sold and it is the concern of the vendee whether or not to discharge the previous encumbrances. In *Muhammad Siddiq Khan v. Muhammad Nasir Ullah Khan*<sup>10</sup> part of the {purchase money was retained by the vendees but not as a mere deposit by the vendor; the money was to be retained as security so that the property sold should be clear of encumbrances and a good title ensured. Their Lordships of the Privy Council held that the vendees were entitled to retain the money until the vendor provided the rest of the money for the purpose of freeing the property from the encumbrances upon it and that from the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest. Similarly in *Izzatunnissa Begam v. Partab Singh*<sup>11</sup> the decree-holder purchased certain property at an auction sale subject to two-prior mortgages, but later on as a result of another litigation the mortgages were declared to be invalid. The judgment-debtor-mortgagor brought a suit against the decree-holder-purchaser for the recovery of the amount due on these two mortgages. Their Lordships of the Privy Council in dismissing the claim laid down at p. 589 that: On the sale of property subject to encumbrances the vendor gets the price of his interest whatever it may be, whether the price be settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property.

39. Their Lordships held that the purchaser was in no sense a trustee for the vendor, liable to account for the amount of the encumbrance which disappeared and. the vendor could not participate in any benefit which the purchaser might derive from his purchase. That was obviously a case where the equity of redemption had been sold and the invalidity of the previous mortgagees enured to the benefit of the purchaser, and the judgment-debtor could not possibly claim a refund of the amount of the mortgage debts which were considered to be invalid. On the other hand, there is plenty of authority in support of the view that where the property transferred to the vendee is free from encumbrance and money is left in the hands of the vendee to discharge certain debts of the vendor, which are not a charge on the property sold, the vendor, in case of non-payment, is entitled to recover the amount. Courts have felt no difficulty in decreeing the claim though there has been some divergence of views as to the true basis on which such a claim should be decreed.

40. In *Raghunath Rai v. Brijmohan Singh*<sup>12</sup> where money had been left in the hands of a second

mortgagee to pay off a prior encumbrance but he kept the money in his pocket, with the result that the prior mortgagee brought a suit against the mortgagor for a much larger amount and obtained a decree, it was held that the mortgagor was entitled to recover the full amount of the decree obtained against him by the first mortgagee. In *Raghubar Rai v. Jai Rai*<sup>13</sup> a Bench of this Court held that upon failure to pay money due by a vendor to a third party, which the vendee agreed to pay without any time for payment having been fixed, the vendor had a right to sue for the money. The learned Judges quoted English authorities to show that even before an injury was done or damage took place, the vendor could bring an action in order that the person making the covenant may place him in a position to meet the liability he had undertaken. The learned Judges held that the breach of the covenant, without any actual loss, gave a sufficient cause of action to the vendor and holding that; the cause of action had accrued on the date of the breach, they actually held the suit to be time-barred. In the course of the judgment they observed that one breach of a contract can furnish only one cause of action and no more and the actual loss when it accrues is only one of the results of the breach and creates no second cause of action. But this was purely an obiter dictum and no part of the actual decision in the case.

41. In *Sarju Misra v. Ghulam Husain*<sup>14</sup> the Bench decreed a claim for damages after the mortgagor who had left money in the hands of the mortgagee for payment to prior creditors who had not been paid oil, had actually made the payment himself. With regard to *Raghubar Rai's* case (1912) 63 I.C. 429 (Supra) they observed that the point whether the date on which the actual loss was sustained gave the plaintiff a second cause of action did not arise in that case and was not decided. In *Ram Narain v. Nihal Singh*<sup>15</sup> one of us, as a Single Judge, followed the ruling in *Raghubar Rai's* case (1912) 34 All. 429(Supra), but with regard to the question whether, if the transferors themselves paid off the mortgage money and redeemed the property, they might not have a fresh cause of action to recover the amount, pointed out that the observations in *Raghubar Rai's* case (1912) 34 All. 429(Supra) were obiter dicta.

42. In *Ramanand Bharti v. Sheo Das* A.I.R. 1921 All. 54(suupra) where, upon a sale of property part of the sale consideration was left with the vendees for payment to the vendor's mortgagee and the sale was pre-empted and neither the vendees nor the preemptors paid the vendor's mortgagee it was held that the vendor could enforce his lien in respect of the money remaining unpaid against the property in the hands of the preemptors. The dictum to the contrary in *Gurdial Singh v. Kararn Singh*<sup>16</sup> was not accepted as it was not necessary for the decision of that case. In *Sheo Pati Singh v. Jagdeo Singh*<sup>17</sup> decided by a Bench of which one of us was a member, it was held that where part of the sale-consideration is left in the hands of the vendee for payment to the vendor's nominee and the amount is not paid as directed, there is nothing to prevent the vendor changing his mind and recovering the amount himself on the ground that, not having been paid as directed, it is his unpaid purchase-money and that his suit cannot be deemed to be premature because he has not paid his own nominee in the first instance.

43. Similarly in *Raghuul Tilak v. Pitam Singh*<sup>18</sup> another Bench of this Court held that it is the

duty of the vendee to pay down the purchase money to the vendor, or to such person as the vendor nominates and the fact that the vendor nominates a third person to receive the money does not mean that the vendee's liability to pay to the vendor ceased. They held that the third person receives and gives a discharge to the vendee on behalf of the vendor, and if the third person does not receive the money, the vendee's liability does not cease. We may also point out that in *Raghunath Chariar v. Sadagopa Chariar*<sup>19</sup> an earlier case of that Court, *Dora Singh Tevar v. Arunachelam Chetti*<sup>20</sup> was followed and it was held that where property was transferred to another in consideration of the latter agreeing to pay certain sums to third persons, a suit to recover the amount was maintainable without showing that the vendor was in any way damnified by the vendee's failure. In *Ram Rachya Singh v. Raghunath Prasad A.I.R. 1930 Pat. 46(Supra)*, it was held that the vendor was entitled to recover the amount left in the hands of the vendee for payment of a previous debt due by the vendor although he himself had not paid the amount, but his brother had done so, and that the vendor was not bound to show that he was in any way damnified by the failure of the vendee to pay the sums left with him. It now remains to consider the true basis of the liability. The rights and liabilities of the buyer and the seller are "in the absence of a contract to the contrary" regulated by the provisions of Section 55 T.P. Act. If there were a special contract to the contrary, such a contract would override the provisions of the section. But the provisions would be enforceable where they do not conflict with any covenants in the contract of sale.

44. But if there is no contract to the contrary, the seller is entitled under Section 55(4)(b) to a charge upon the property in the hands of the buyer for the amount of the purchase money remaining unpaid and for interest on such amount. Under Sub-section (5)(b) the buyer is bound to pay or tender the purchase money to the seller or such person as he directs; provided that where the property is sold free from encumbrances the buyer may retain out of the purchase money the amount of the encumbrances on the property and shall pay the amount so retained to the persons entitled thereto. It follows that where property is sold free from encumbrances and yet there are encumbrances outstanding on the property the buyer may retain in his hands sufficient amount to pay off the encumbrances, but it is his duty to pay the amount so retained to the prior encumbrancer. The vendee cannot be allowed to retain the amount and neither pay it to the seller nor to the encumbrancer. Now where property has been transferred by a vendor to a vendee and there is a direction to the vendee to pay off a third person, the transaction may be one of any of the three following characters : (1). The amount left in the hands of the vendee may be a part of the purchase money remaining unpaid, in which case it is obviously money belonging to the vendor and if not paid as directed is still due to be paid to the vendor; (2) or it may amount to a covenant with an undertaking to relieve the vendor from his existing liability in which case a suit on the covenant may lie, or (3) it may be a mere promise to perform an act for consideration or a contract of indemnity in which case a suit for damages incurred on the breach of the contract would lie under Section 125 of the Contract Act; but it must be proved that loss has been sustained. Where the money left in the hands of the vendee is in substance a part of the purchase money itself, there is a statutory charge created by Section 55 which is enforceable as such. The

money is already due to the vendor and if not paid as directed can be recovered by enforcement of the charge without the vendor being called upon to show that as a consequence of a breach of any covenant he has suffered some other actual damage. Such a suit is not of the nature of a suit for damages on breach of contract at all, but a suit for recovery of amount due by enforcement of the charge. The position is similar to a person who mortgages his property as security for the payment of an amount due from him. On a suit for sale to recover that amount, it would be no defence that the mortgagee has not by the non-payment suffered any damage in any way. The amount is due and must be paid, and if not paid, it can be recovered without proving any other special damage.

45. In the second case if there is a clear undertaking and the vendee has agreed to release the vendor either from his personal liability to another person or release his property from any previous encumbrance, he is bound to fulfill his undertaking. A suit on the covenant would lie : *Loosmore v. Radford* (1842) 9 M. & W. 657. Where a date has been fixed for payment and that date had expired the suit to enforce the covenant may perhaps not strictly be called a suit for specific performance of contract, but it is certainly a suit on the covenant to compel the vendee to release the vendor from his liability which he had undertaken to free him from. In order to explain the point we may give an illustration : A money decree against an owner of property is in execution and he is liable to be arrested and sent to jail and an ancestral house of his is also liable to be attached and sold. With a view to saving himself from the disgrace of being sent to jail and also to protect his ancestral house he transfers all his other properties to a vendee who agrees to pay off the decree by a certain date. The vendee fails to pay the amount. On a suit brought by the vendor to enforce the covenant, it can hardly be a defence to say that as the fixed date has expired the vendor must now wait till he has been arrested and sent to jail and then sue for damages for breach of contract, or that he must wait till his ancestral house had been sold and then sue for damages for the loss sustained. The vendor is entitled to enforce the covenant and when there is an immediate apprehension of his suffering irreparable loss he is entitled to call upon the vendee to make good the payment which he had promised to make. The fixing of the date was for the benefit of the seller and there is no reason why he should not insist on the covenant even after the expiry of the date. In the third case, where there is a mere contract to perform an act or to indemnify the promise, a suit for damages, of course, lies only when damage has been suffered. But it would be wrong to suppose that time for a suit for damages for such a breach of contract would have commenced to run from the original failure to perform the contract even before any damage was sustained. The damage caused would undoubtedly give a fresh cause of action for a suit for damages which is of a different character from a suit for the enforcement of the covenant. We must now consider the terms of the contract between the parties. In view of the fact in the sale deed by Mt. Naima Khatun there is no express mention in the body of the document that she herself would have to make any payment to the prior mortgagees, that in the endorsement where there is a reference to the amounts left in the hands of the vendee for payment to the mortgagees the recitals for payment are previous to the recital that the executant would be responsible to get the property relinquished and the fact that in the

contemporaneous security bond there was a specific date mentioned by which the defendant must make the payment to the mortgagees and there was no reference to any payment being made by the vendor herself, the Bench has interpreted these documents to mean that it was the duty of the vendee to make the payment to the mortgagees in the first instance. Admittedly no tender was made. Indeed, the vendor has produced the mortgagees in order to show that they would have been prepared to accept the payments if they had been made.

46. The sole question of interpretation before us is whether there was any special contract between the parties under which the vendee was liable to pay the amount left in his hands to the plaintiff herself if he did not pay it to the mortgagees. In the security bond (p. 139) the vendee, after having recited that Rs. 19,800 had been left with him for payment of the debts due to the prior mortgagees, stated that the vendor for the satisfaction of the fact that the vendee should pay the amount aforesaid (rupiya mazkur) by 10th January 1926 demanded security, he hypothecated his property as security for the same and gave it in writing that he should pay the aforesaid amount (rupiya mazkur) to the mortgagees by the 10th January 1926 and that he would raise no objection and then stated: If I fail to pay the said amount (rupiya mazkur) by the date mentioned above, I shall be liable to pay to Mt. Naima Khatun aforesaid Rs. 15,000 as damages (harja) in addition to the amount aforesaid (rupiya mazkur). For default in payment Mt. Naima Khatun shall have power to realize the amount aforesaid (rupiya mazkur) with damages (harja) and costs by enforcement of the hypothecation line, and auction-sale of the property given below, as also the other property of every description and the person of me, the executant, in any way she may-like and I shall have no objection whatever.

47. From a perusal of the document it is quite clear that the sum of rupees 19,800 has been referred to at several places in this document as "the amount aforesaid" (rupiya mazkur) whereas the sum of Rs. 15,000 is referred to as "damages" (harja). It is also clear that there was a special covenant that if the vendee failed to pay the amount aforesaid, i.e. Rupees 19,800 by the date above mentioned he would be liable to pay to Mt. Naima Khatun Rs. 15,000 as damages in addition to the amount aforesaid, i.e. Rs. 19,800; and that on de-default the vendor would have power to [realize the amount; aforesaid, i.e., Rs. 19,800, with damages, i.e., Rs. 15,000 and costs by enforcements of the hypothecation. We have no doubt in our minds that on a proper interpretation of this document the defendant-vendee agreed that in case of default of payment to the prior mortgagees by the date mentioned, he would be liable to pay to Mt. Naima Khatun both the amount of damages to the extent of Rs. 15,000 as well as the amount of Rs. 19,800 which had been left in his hands for payment. We are not concerned with any hardship that such an undertaking might have involved. If the defendant entered into such a covenant he is liable to pay the amount to the vendor. It is no defence to say that he would not pay Rs. 19,800 to the vendor so long as it is not established that the vendor has actually suffered damages or sustained any other loss.

48. Such a defence is of no avail so far as (the sum of Rs. 19,800 which was part of the purchase

money is concerned, but would have force so far as the sum of Rs. 15,000 is involved. This last mentioned sum was in the nature of a penalty, and under Section 74, Contract Act, the vendor can recover only the amount of damages [which she can prove that she has incurred up to the maximum of Rs. 15,000. In this view of the matter, we hold that there was a special contract under which the vend of agreed to pay to Mt. Naima Khatun direct the sum of Rs. 19,800 exclusive of damages and costs in case he failed to pay the amount to the previous (mortgagees by 10th January 1926. On this security bond the plaintiff is entitled to maintain her suit for recovery of this amount without first proving that she herself has had to make the payment to the mortgagees.

49. We further think that inasmuch as this amount of Rs. 19,800, if paid, would have gone to free from the encumbrances not only the property transferred to the vendee but also the other two properties of the vendor, at any rate, to a substantial extent, it is impossible to hold that the transaction was in the nature of a mere sale of an equity of redemption. We must hold that this sum of Rs. 19,800 which the vendee promised to pay under the security bond was a part of the unpaid purchase money. Accordingly a suit compelling the defendant to make the payment would lie. The plaintiff's remedy is not restricted to a claim for damages for breach of contract only after she has been actually damnified by the defendant's failure.

50. Mr. Mukerji, counsel for the plaintiff has however consented that the defendant may be called upon only to pay the amount with interest and costs in Court to the credit of the previous mortgagees, and that she should get only the surplus that remains after the mortgagees have been paid off and the property transferred to the vendee completely freed from the charge. He has further agreed that even any other previous encumbrances that might be discovered should be discharged out of the money deposited by the defendant before any payment is made to the plaintiff. This is a very fair request which we are glad to accede to.

51. Our answers to the questions referred to us are therefore as follows : (1) The plaintiff is entitled to a decree for refund of the whole of the amount left in the hands of the vendee together with interest at the rate running in the mortgage debts. But in view of the consent of the plaintiff's counsel the amount should be deposited in Court for payment of the previous encumbrances in the first instance. (2) She is not entitled to any decree for damages, without proving the extent of the damages actually incurred by her. (3) No decree for the specific performance of the original contract as it stood can be made in this case, but the plaintiff can compel the defendant to pay the amount in order to release her other properties from liability even though she may not yet have suffered actual loss.

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3(1912) 34 All. 341

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5A.I.R. 1916 P.C. 242  
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13(1912) 34 All. 429  
14(1920) 63 I.C. 87  
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19(1913) 36 Mad. 348  
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